(9)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 511.

CITY OF MENASHA,
Petitioner,

vs.

CLARENCE FURTON, TRUMAN FURTON, LUKE FURTON, FRED FURTON and RALPH JOHNSON, Co-Partners, Doing Business as FURTON BROTHERS CONSTRUCTION COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

WILLIAM B. RUBIN,
606 W. Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Synopsis.

The pleadings and affidavits present a genuine issue for a court or jury.

Table of Cases.

Wisconsin Statutes.

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OPINION BELOW.

The opinion of the Circuit Court below at Tr. 115-119, also 149 F. (2d) 945.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347a).

QUESTION PRESENTED.

Does the record make a proper case for summary judgment?

The Circuit Court of Appeals held it did not.

NO SUFFICIENT GROUNDS FOR CERTIORARI.

Rule 38 of this Court holds:

> "* * * A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

(1) The decision of the Circuit Court of Appeals presents no conflict of decisions. It follows the decision of this Court in **Sartor v. Arkansas Nat. Gas**, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967.

(2) It presents no issue of general public importance.

(3) The record discloses a controverted issue of fact.

The Court of Appeals, in its decision (Tr. 118, 119), found a controversy existed for a jury as to:

(a) The completeness of the work,

(b) The failures of payments and their causes,

(c) The added cost and the trouble traceable to the rock bottom representations,

(d) Lack of written order by the engineer for additional work and expense,

(e) The waiver by the parties of such written order,

(f) The nature and character of the rock bottom representations,

(g) Misrepresentations as to the bed rock,

(h) Failures to meet the terms and conditions of the contract and their excuses.

ARGUMENT.*

A.

The City of Menasha is the owner of a water utility. The city is one of a cluster of five cities (Fond du Lac, Oshkosh, Neenah, Menasha and Appleton) in the Lake Winnebago region.

The respondents were the successful bidders to build for the City of Menasha a pre-settling basin and a 30-inch pipe some 3600 feet in length, connecting the basin with its filtering plant. The supply of water to come from Winnebago Lake over to Menasha Dam, the crest of which is 94.2, more or less, feet above the sea level.

The water in the Winnebago area has a mossy condition, a vegetation which grows in the water during the hot and dry period of the summer when the water is low and practically dormant in Lake Winnebago. The vegetation thrives and pollutes the water. The purpose of the pre-settling basin is to harvest this crop of vegetation and remove it from the water, clearing it of the moss. The pre-settling basin approximately is a three-acre pit and 7 feet deep.

The contract called for the excavation of such a pit and the building of a control house and a 30-inch pipe 3600 feet in length and concrete baffle walls. The baffle walls, five in number, are concrete structures, sort of a zigzag affair, which cause the water to be evenly distributed during the period of sedimentation and equalize it as it enters the pipe on its way to the filtering plant. The baffle walls are higher than the water. The water enters the control house, at the northeast corner of the pre-settling basin, where it is first chemicalized. It then leaves the control house and enters the pre-settling basin, passes against,

*Unless otherwise indicated, emphasis supplied.

around and about the baffle walls, then into the pipe and from there to the filtering station to the southeast.

The respondents were the successful bidders and were given the contract to do that job for $78,000. The breakdown cost shows that two items were the principal ones—excavation, amounting to $33,600; and the 30-inch pipe, to cost $13,068. The contract had the following provisions:

> "(a) For the completion of all the work in accordance with these plans and specifications, the sum of Seventy-eight Thousand ($78,000.00) Dollars (Tr. 18).
>
> "(b) For earth excavation and disposal that may be added or **deducted**, the sum of Forty Cents ($.40) Dollars per cubic yard (Tr. 18). (Note the word deducted.)
>
> "For all extra work of every description, that may be ordered, not covered by the foregoing unit prices, the Contractor shall receive actual cost of material furnished, and labor performed, plus Fifteen (15%) per cent for profit, use of tools, equipment, job superintendent, time-keeper, and general supervision, and any other overhead and fixed charges" (Tr. 19).
>
> **"The Contractor and the Commission agree that the Specifications and Drawings, together with this Agreement, form the Contract, and that they are as fully a part of the Contract as if hereto attached or herein repeated"** (Tr. 19).

The specifications contain the following:

> "Contractors submitting bids or tenders on this work are expected to compare the plans and specifications with the site. Drawing No. 9605 accompanies these specifications" (Tr. 21). (The drawing is found on page 97.)
>
> "The Contractor is to be held responsible that the work to be done under these specifications is erected by him in strict conformity to the drawings, except as otherwise directed by the Engineer in writing; (Tr. 22).

". . . and the difference in expense occasioned by such increase, diminution or alterations so ordered and directed shall be **added** to or **deducted** from the amount payable under this contract; and the said Engineer shall ascertain the amount of such additions or deductions" (Tr. 25).

"Contractor shall excavate the settling basin area **to rock**, which is at elevation 87.2± or approximately seven feet below the crest of the Menasha dam" (Tr. 29).

It is our contention, as shown on this map (Tr. 97), that this pre-settling basin, to hold twenty million gallons of water, required the excavating of approximately 100,000 cubic yards in order to reach its rock base at 87.2 elevation. That under the contract, if for any reason the rock was found to be at a higher elevation, let us say, five feet rather than seven feet, there would be a deduction from the amount under subdivision (b) of the contract (Tr. 18).

There is a conflict of claims in forty instances, and although some of the controversies are not strictly germane to the issue, yet they are so interwoven that they must be considered in determining the genuine issue. Therefore a genuine issue.

The term "rock" was and is understood by the trade and those who understood its technical terminology, and was understood by the parties to the contract to mean "rock bottom," the map indicates that it was so held out to be. The petitioner denies by its answer that rock had such connotation.

To build a basin you start at a common point and dig to rock, covering an area on a ramp approximately thirty feet wide. After that you spread out and use the ramp for the trucks and work, having a solid bottom for your work. The tools and implements and trucks necessary for hauling the dirt out of such a basin is a matter of calculation and very easily accomplished and is made the basis for computation when bidding for the job.

The work was commenced as the contract provided, seven days after the 17th day of December, 1941, and to be completed on or before the 30th day of June, 1942. The advantage of starting work in the winter is that the soil is hard and if the rock had existed in the bottom of the basin the excavation could have been completed during the freezing weather, giving the respondents frozen soil to ride the trucks over to the dump and the job of excavating would have been finished before the rainy season.

No rock was found except one little ledge of about four to five inches thick and about 100 feet in diameter. A rather small portion of the excavation was done, to-wit: the entire job was approximately 30% and the excavation about 15% complete when it was discovered that there was no rock. While working on this ledge the respondents excavated 369 yards at a cost of 33¢ per yard to themselves, and on December 21st, 1942, they had already excavated 107,964 cubic yards and the cost had risen to $1,065 per cubic yard (Tr. 71).

When it was discovered that there was no rock, two test pits were dug by and under the direction of the city's engineer and hand shoveled three feet below the supposed seven foot rock level. There was no rock to be found. The cost of $33,600 for excavation was calculated by the respondents on a basis of 100,000 cubic yards. Due to an absence of a rock bottom the respondents, under direction of the engineer, were entitled to the increased cost plus 15%. The amount set up in the complaint was figured on the actual cost, without profit, for which the respondents furnished itemized forms from time to time to the petitioner. The extras in connection with the construction of the baffle walls is that in making them deeper than called for originally and a housemat for the control house was necessitated by reason of lack of a rock bottom. If there had been a rock bottom as relied on, the cost would have been as first estimated, because it would have

required less pumping over the part of the area covered by water, and after rock was struck the only pumping would be to take out the little seepage. With a rock bottom instead of mud and clay they would not have been obliged to rent and buy additional shovels and larger tools and trucks or incur additional loss of time and labor; besides, they would not have been impeded by the rainy season.

We call attention to a letter by the City's Engineer, in which the Engineer states (Tr. 77):

> "Referring to your estimate for extra work for trenching and lowering baffle walls, we wish to advise that the Menasha Electric & Water Utilities have decided to go ahead with this work on the basis of the unit prices set up in your estimate of March 13th. The total amount involved should not be any more than the total listed in your estimate, and **as we understand it the rock pitches upward towards the south,** so that the depth of excavation and the depth of concrete should be less than that given in your estimate, as well as the amount of reinforcing and the amount of forms.
>
> "Please consider this letter as authorization to proceed with this work."

The work was commenced at the northeast corner, the location of the head house and headed for the southwest corner. This was clearly misleading since there was no rock to pitch anywhere.

The Engineer knew what equipment the respondents possessed. He knew the basis for respondents' bid and the work it required at the time of the contract. He considered it adequate, and **it would have been adequate but for this error as to rock.** The respondents were caught by the error and were obliged to rent and buy new equipment and incur various costs because of that, all of which was itemized for the city from time to time.

The Engineer wrote (Tr. 79):

> "It is therefore imperative that you get another shovel on the job and some additional trucks so that this work can proceed more rapidly."

The original tools were not adequate.

The Engineer wrote (Tr. 80):

> "We understand that you plan to get an additional shovel to help you with the dyking, and in addition to this that you expect to go on a two-shift basis in the trenching across the park."

The Engineer wrote (Tr. 86):

> "Unless you find a much softer material than that we looked at this morning, it will only be necessary to trench for the footings, which will make the top of the footings flush with the bottom of the rest of the basin."

The Engineer knew that the respondents struck no rock and that it was a costly proposition (Tr. 83):

> "Here again they thought that your price was pretty high, but they feel that you have been having some tough breaks and they think that you are entitled to make a little profit on the rip rap" (Tr. 83).

And on Tr. 83:

> ". . . it is more important to get the excavation completed . . . ."

And on Tr. 86:

> ". . . you are hereby notified to prosecute this work and additions thereto so that it may be completed as promptly as possible."

The additions referred to were the deeper baffle walls and the head house mat because of no rock bottom.

We submit that a reading of the letters and directions by the Engineer to the respondents to continue with the work although they could have quit when they discovered there was no rock, or continue as they did by reason of the breach of an implied warranty, and under the contract recover their cost because of the extra work, tools, equipment, etc., to which they were put.

The respondents went broke on the job and finally were ordered off.

B.

PLAINTIFF'S LOSS DUE TO BREACH OF WARRANTY.

The work proposed to be done by the respondents was on the basis shown by the drawings and not upon the basis of conditions undisclosed to them.

The contractor relied upon information furnished and was misled by the erroneous specifications and deceptive drawing.

Christie v. United States, 237 U. S. 234, 59 L. Ed. 933, the classic case on the subject, was an action for damages in excess of $200,000 against the Government, growing out of a contract in the construction of locks and dams in Alabama. One of the items was greater expense of excavation and pile driving, due to misrepresentations of the materials in the specifications and drawings: increase in excavation, due to the "angle of repose" fixed by the officer in charge. One of the items considered by the Court was (quoting from page 935):

> "(1) This item is based on a charge of erroneous and deceptive borings and misrepresentations in the specifications and drawings.
>
> "By paragraph 48 of the specifications it is, among other things, provided: 'The material to be excavated, **as far as known** (emphasis ours) is shown by borings,

drawings of which may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material.' "

Notwithstanding it was claimed by the contractor that the statement in the specifications was untrue and misleading, causing him to propose to do the work upon the basis shown by the drawings, and not upon the basis of the more difficult and expensive work; that the contractor relied upon information thus furnished and was misled by the erroneous and deceptive drawings. The Court found that the contractor was justified in reliance upon the drawing in making the bid.

"It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive."

And there was also a finding that the "angle of repose" did not take into consideration **the abnormal conditions encountered during the work.** Floods, freshets and unlooked-for rises of the river were more numerous and of greater height and of longer duration than theretofore disclosed by the official records of the engineer's office relating to the river. The specifications provided also:

"All excavations shall conform to such lines, slopes, and grades as may be given by the engineer officer, and anything taken out beyond such given limits will not be paid for by the United States . . . ."

The Court saying:

"For the error in not allowing the demand of the greater expense of excavation and pile driving, due to the misrepresentation of materials in the specifica-

tions and drawings, the judgment is reversed and case remanded for further proceedings in accordance with this opinion" (page 939).

Hollerbach v. U. S., 233 U. S. 165, 58 L. Ed. 898;
Spearin v. U. S., 248 U. S. 132, 63 L. Ed. 166-9-70;
U. S. v. Atlantic Dredging Co., 253 U. S. 1, 64 L. Ed. 73-5-8.

In the **Christie v. U. S.** case (supra) the Court held as error not to allow the demand of greater expense of excavation and pile driving due to misrepresentations of the materials in the specifications and drawings.

The City was acting in a proprietary capacity and its contracts are governed by the same rules as contracts made between individuals.

In **Maney v. City of Oklahoma City, 300 Pac. 642, 76 A. L. R. 258,** a contractor employed by the municipality in the construction of a waterworks plant, contracted to excavate a by-pass and in so doing he encountered a large quantity of rock which was unexpected by the contractor and the city. He incurred an extra expense over and above that which was represented by defendant city and its engineer, by its plans, specifications, maps and borings. The contractor having relied upon the city's plans and specifications, etc., he was entitled to recover, and from a judgment in favor of the city which was reversed by the Supreme Court of that state, and quoting from the contract (see pages 262, 263 and 265), similar to the contract and specifications in our case, the Court said, on page 265:

> **"The city, in erecting its waterworks system, was acting in a proprietary capacity and not in a governmental capacity, and its contracts are governed by the same rules as contracts made between individuals."**

And on page 267:

> "A different rule applies where the contractor must build and complete a structure according to the plans

and specifications by the owner. **The contractor will not be required to bear extra expense resulting from the performance of the contract on account of defects in the plans and specifications prepared and submitted by the owner.''**

And the general rule is laid down in the annotations on page 269:

> ''The general rule may be deduced from the decisions that where plans or specifications lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented.'' (Citing numerous United States Supreme Court and Federal cases, including the classic case of Christie v. United States, 237 U. S. 234.)

It is the general rule that where a contractor is led to believe that certain conditions exist and may be relied upon in making his bid, he will be entitled to compensahion for extra work or expense made necessary by conditions being other than as represented.

It is contended that because of the following language in the instructions to bidders (Tr. 17):

> ''(c) Bidders must satisfy themselves, by personal examination of location of the proposed work, and by such other means as they may prefer, as to the actual conditions and requirements of the work, and shall not at any time after submission of a bid dispute, complain, or assert that there was any misunderstanding in regard to the nature or amount of work to be done.''

And in its proposal (Tr. 95):

> ''Having carefully examined the Advertisement, Instructions to Bidders, **Contract Agreement**, General

Conditions, **Specifications**, Bonds, and **Plans** for the proposed work, and having informed ourselves fully in regard to the conditions to be met in its execution, the undersigned proposes, etc."

In the first place, the examination of the location did not require him to engage in independent exploration. The general clauses do not overcome the implied warranty. The obligation to examine the side did not impose upon the respondents the duty of making a diligent inquiry into the history of the locality with a view of determining, at their peril.

In **United States v. George B. Spearin, 248 U. S. 131, 63 L. Ed. 166**, the Court said, on page 169:

"**This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work** . . . (citing Christie v. United States, the leading case, and others), where it was held that the contractor should be relieved if he was misled by erroneous statements in the specifications. . . .

". . . **This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality, with a view to determining, at his peril, whether the sewer specifically prescribed by the government would prove adequate.** The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

"Neither Sec. 3744 of the Revised Statutes (Comp. Stat. 1916, Sec. 6895), which provides that contracts of the Navy Department shall be reduced to writing, nor the parol-evidence rule, precludes reliance upon a warranty implied by law."

In **Bentley v. State, 73 Wis. 416**, the state, in building the capitol had warranted the sufficiency of the original plans, and therefore became liable for any additions to which Bentley was put. The Court, on page 430, used the following language:

"In other words, the contention is that the plaintiffs assumed the risk of the sufficiency and efficiency of the plans and specifications, and the materials and workmanship thus exacted, approved, accepted, and paid for by the state; and hence must suffer and make good the loss occasioned by such defects. . . . The fall was not the result of inevitable accident, as in several of the cases cited by counsel . . . it was in consequence of inefficient and defective plans and specifications therein mentioned. **According to such allegations, we must infer that there was in such agency of the state a lack of learning, experience, skill, and judgment to draw adequate and efficient plans and specifications for a building of that magnitude.** But, as observed, the state, through its own chosen agency, undertook to furnish, for the guidance of the plaintiffs, 'suitable and proper plans, drawings, and specifications for the construction' of such buildings, and then bound the plaintiffs to build according to them unless otherwise directed by its architect. Under the allegations of the complaint, we must assume that such inefficiency and defects were not patent to an ordinary mechanic, but were, as to the plaintiffs, latent."

In the Bentley Case the specifications contained language in many respects similar to the specifications here, to-wit: The **accuracy of it was not guaranteed**; the city

should not be liable for any extra work in removing more than indicated in the drawings; the contractors were to take out their own quantities, and to satisfy themselves as to the nature of the ground through which the foundations were to be carried; that no surveyor was authorized to act for the city, and that no information given was guaranteed; that the contractors were to assume all risks and responsibility in the sinking of such caissons, and to employ their own divers or other efficient means for removing and overcoming any obstacles or difficulties arising in the progress of the work; that the quality of the concrete was put under the control and direction of the engineer; that extra or varied work was to be certified, accounted, and paid for at prices named. It was after the contractor undertook the work that he discovered that the caissons were not sufficiently adequate for the purposes and required alterations and additions which occasioned loss of material and work and extra material and work and considerable delay. Quoting from the Thorn Case, the Court found, on page 433:

> "The question presented was whether there was any implied warranty on the part of the city that such caissons would prove efficient to shut off the water while building the piers."

It seems reasonable that the contractor should rely implicitly upon the direction of the engineer with regard to a question that was solely one of engineering.

In **City of Wheeling v. John F. Casey Co., 74 F. (2d) 794 (4 C. C. A.)**, in an action similar to the case at bar, the Court said, on page 796:

> **"That the mistake was not intentional seems clear, and it is contended on behalf of the city that the plaintiff, having contracted to construct the project according to the plans and specifications, should have**

discovered the mistake before beginning the work. On this point we agree with the judge below that the question as to whether the plaintiff in the exercise of reasonable care should have known of the mistake was one for the jury. . . .

". . . It seems to us reasonable that the contractor should rely implicitly upon the direction of the engineer with regard to a question that was solely one of engineering.

"We are unable to adopt the view that because of these provisions plaintiff was deprived of the right to rely upon representations of fact. While defendant refused to guarantee the absolute accuracy of the profiles or the results of the borings as shown thereon, it did state as facts that the borings were actually made, and 'for the information of the contractor' the results appearing on the profiles were 'reasonably correct.' There was an **implied warranty of the verity of those statements**, and similarly that the results plotted on the profiles were 'reasonably correct,' subject, of course, to errors of the employes of the city—not bad faith—in observing and recording the results."

There was an implied verity of those statements, and similarly that the results plotted on the profiles were "reasonably correct."

In **Pitt Const. Co. v. City of Alliance, Ohio, 12 F. (2d) 28 (6 C. C. A.)**, the blue prints for the construction of a coagulation basin showed one distance from the surface to the bottom while the facts were quite different, and it was contended by the city:

"(1) That the blue prints did not amount to a misrepresentation of fact. (2) That the contractor assumed the risk of any such error. (3) That the contractor, at the time of making the contract, was chargeable with notice of this error, and could not rely upon it. (4) That the claim was barred by the arbitration provisions of the contract."

In the case at bar (4) would be that the claim was barred by the rulings of the engineer.

The Court said, on page 30:

> "It is urged that the contractor's duty to examine the premises carried an assumption by him of the risk that there might be an error of the class which developed. We think this contention unsound. Perhaps the contractor by the use of sufficient instruments and effort, or by reference to whatever elevation datum may be the accepted starting point in that locality, could have ascertained that an elevation of 1026 feet above sea level would have been 3 feet below the ground and not 9 feet below, at the point indicated for the forward bottom corner of the structure. Perhaps not. Surveyors often disagree to that extent. So, too, in the case of Hollerback v. U. S., 233 U. S. 171, 175, 34 S. Ct. 553, 58 L. Ed. 898, the contractor need have sunk only five feet to ascertain that there was rock where the specifications showed there was not; but in this case, as in that, the contractor was entitled to accept, and to formulate his bid in reliance upon, the representation of fact by the other party. In substance and effect we cannot distinguish that case from this."

In **Palmberg v. City of Astoria (Ore.), 199 Pac. 630,** reported **16 A. L. R., page 1125,** both the cases and the annotations hold, page 1131:

> "In harmony with that view it has been held that a contractor may recover for extra work necessitated by mistake of the assistant engineer of a city in giving an insufficient depth for the excavation of a sewer trench."

In **Tomlinson v. Ashland County, 170 Wis. 58,** the Court said, on page 68:

> "The plaintiffs were entitled to rely upon what was in effect represented by such plans and specifications."

Citing the case of **Christie v. United States, 237 U. S. 234,** for its authority, and made the further comment (page 68):

> "The power to construe and define the intent and meaning of plans and specifications made a part of the contract is one thing, and may properly be, as it was in this instance, left to arbiters selected by the parties; the power to construe the contract itself and to determine what is within and what is without such contract is a different and independent question, and belongs primarily to the courts."

In **First Savings & Trust Co. v. Milwaukee County, 158 Wis. 207,** page 226:

> "Undoubtedly it was the duty of the county to cause to be prepared substantially complete plans and specifications before advertising for bids. It should also exercise good faith in making changes and could not make them simply for the purpose of favoring a contractor or of evading the statute. But neither our architects nor engineers have arrived at that stage of perfection where they can design great structures and unerringly provide for every detail of their construction. They overlook things, and occasionally they make mistakes where they do not overlook. Sometimes these mistakes may be serious. Then, too, we are moving all the time whether we are progressing or not. New and advanced ideas even in the matter of concrete construction might well be worked out during the life of the contract sued on. If the plans proved to be inefficient in some important detail, it would be serious indeed if the county were required to go on spending its money on what might prove to be a worthless structure, when the waste and loss could have been avoided at a moderate cost, or possibly at no cost at all. We cannot think the legislature ever intended to create such an intolerable situation."

On page 230:

> "The facts present a strong case for the application of the doctrine of waiver. There is evidence tending to show that the engineer gave peremptory orders which he refused to put in writing, claiming that he did not have to do so and that he would drive the contractor off the work if they were not obeyed, and that the committee as well as the assistant district attorney upheld him in his position."

And on page 231:

> "The county in the first instance might have contracted that the required notice need not be in writing. It might modify the contract in this regard if it saw fit. No good reason is apparent why it might not waive it. Municipalities, and particularly cities, are continually entering upon new enterprises which often require the expenditure of large sums of money for construction work. They are building, acquiring and extending waterworks plants, lighting plants, telephone lines, and some of them have gone into the street railway business. They must construct school houses, court houses, city halls, streets, sewers, and such like. In doing this work they aim and from a practical point of view are obliged to carry it on much the same as individuals would. In dealing with their contractors and employees it woud seem reasonable that they should be subject to substantially the same rules of law that govern private individuals."

C.

THE RECORD ON ALL THE MATERIAL ISSUES PRESENTS A GENUINE ISSUE.

I.

The Pleadings.

Defendant, in paragraph 3 of its answer, alleged:

> "Denies that it has **information sufficient to form a belief** as to the truth of the allegation that plaintiffs

learned that there was no bed-rock at or near the elevation specified in the contract after such work was under way" (Tr. 41).

And in its answer, paragraph 7:

"Admits the allegation contained in paragraph 11, that the cost of excavating such pre-settling basin had been estimated by said engineer and admits that the engineer's estimate for the excavation of such pre-settling basin was lower than the contractor's estimate. Alleges that the contractor made his own estimate of such cost in submitting his bid and denies that it **has information sufficient to form a belief** as to the truth of the allegation that the contractor's estimate of the cost of the contemplated excavation of the pre-settling basin was carried into, and was used in determining the amount of the plaintiff's bid, or that such estimate was the sum of Nineteen Thousand, Nine Hundred Eighty Dollars and 20/100 ($19,980.20) . . ." (Tr. 44).

And by paragraph 8:

"Denies that the defendant has **information sufficient to form a belief** as to the truth of each and every allegation contained in paragraph 12 of said complaint" (Tr. 44).

Paragraph 12 of the amended complaint (Tr. 14) is:

"The actual cost and expense to the plaintiffs in performing the said different or additional work in excavating the said pre-settling basin according to the directions of the engineer and under the conditions actually encountered was $120,974.91, which cost or expenditure was reasonably incurred under the conditions actually existing."

A denial by defendant on information and belief (Par. 3, Tr. 41, Pars. 7 and 8, Tr. 44), and an averment in the affidavit, "from said estimates it is **apparent** that no claim

was made for excavation work which was not included in the contract," are neither sufficient nor competent on a motion for summary judgment. **Walling v. Fairmont Creamery Co., 139 F. (2d) 318 (8 C. C. A.).**

The answer takes issue with the allegations in the amended complaint. It even takes issue with the allegations, Par. 6 of the amended complaint (Tr. 12), that the term "rock" as used in the contract, is synonymous with the term "bed rock" and so known and considered by the parties.

> "Where a technical term is used in a contract, and expert witnesses differ as to its meaning, and where the evidence relating thereto is in conflict, the meaning of such term becomes a question of fact for the jury to determine."
>
> **State v. Commercial Casualty Co., 248 N. W. 897, also in 88 A. L. R., page 790.**

We submit same are neither sufficient nor competent on a motion for summary judgment.

The engineer may not by his construction of the contract invade the province of the Court.

> "The construction, therefore, by the architects of the questions involved as to the right of the plaintiffs to charge for and recover for these two items, being an attempted decision on their part on a matter that was beyond their jurisdiction, is not binding on the parties nor controlling on the Court."
>
> **Tomlinson v. Ashland County, 170 Wis. 58-69.**

There a change was made in the plans indicating that certain of the columns or piers were to be of greater length than originally indicated, but no reference was made in such changed plan or notice of the difference in elevation of the surface soil or that any filling of material in or

around the building would be thereby rendered necessary. The contract provided that no alternations shall be made in work except upon written order of the owner and the architect. The Court said, on page 68:

> "The plaintiffs were entitled to rely upon what was in effect represented by such plans and specifications. . . .
>
> "The power to construe the contract itself and to determine what is within and what without such contract is a different and independent question, and belongs primarily to the courts.
>
> ". . . The knowledge on the part of all concerned that the work was being so done and it having been done in good faith and a reasonable amount only having been charged for it—all these conditions created a situation under which there arose an **implied obligation** on the part of the county to pay for such work" (page 69).

See, also:

Shine v. Hagermeister R. Co., 139 Wis. 343.

See Annotations 137 A. L. R., beginning page 530, and for Federal cases, pages 536 to 540, where the rule is laid down,

> "that if the decision amounts to a construction of the contract (the court also having to determine this question) it is not binding and does not preclude the court from reconsidering and determining the dispute,"

the decision that extra cost not payable held to be one of construction of contract and therefore not binding (page 536).

II.

The Affidavits.

(a)

The City's and Petitioner's Affidavits.

The affidavits are without any fact not covered by the denials in their answer. Mere assertion that the plaintiffs were without instructions to perform the work required by the uncontemplated changed conditions and therefore leave no issue of fact for determination by the court upon a summary proceeding.

(b)

The City's and Petitioner's Two Affidavits Are Met by the Affidavits of the Plaintiffs and Respondents.

(Tr. 69 to 96, inclusive.)

The pertinent parts at issue are as follows:

(a) The engineer, Orbison, informed Luke Furton, "That rock was known to exist at the elevation shown on the plans on all sides of the area to be excavated" (Tr. 69).

(b) That prior to the execution of the contract inquiry was made as to whether or not it was definitely known that rock underlay the entire area at the specified elevation, and as to what would be the result if it did not (Tr. 69).

(c) That if the rock were found to be lower it might involve more expense to excavate the earth (Tr. 69).

(d) That it would be up to the Engineer and that under the contract plaintiffs would be paid their extra expense for such work (Tr. 70).

(e) That defendant dropped the idea of test boring (Tr. 70).

(f) That it was discussed that the plaintiffs might be required to do considerable work without profit, but that plaintiffs would get their additional costs (Tr. 70).

(g) That the statement by the Engineer that he never authorized any extra, addition, or different work except two specified extras is untrue (Tr. 21). See Engineer's own estimate under date of October 3rd, 1942, which includes six extras (Tr. 84, 85).

(h) That the job was approximately 30% complete and the excavation about 15% complete when it was first discovered that rock did not exist at the elevation shown on the plans under some of the area to be excavated (Tr. 71).

(i) That plaintiffs thereafter notified the engineer and under his direction a test pit was sunk to determine the location of the rock. That no rock was found in said test pit (Tr. 72).

(j) That the contract called for baffle walls to be erected upon the rock supposed to exist at the level of the bottom of the basin (Tr. 72).

(k) That the Engineer then stated that the baffle walls could be erected on foundations placed in trenches in the soil instead of on rock and directed a submission of an estimate of the extra expense thereof (Tr. 72).

(l) That at the time of the estimate it was not known what additional expense would be incurred by reason of the absence of rock at the expected elevation, except that it would cost many times more where the rock was not present (Tr. 72).

(m) That the plaintiffs submitted an estimate as requested by the Engineer for the different work required to be done in erecting the baffle walls, which involved a **known amount** of earth excavation, and **known amounts** of concrete, reinforcing and forms (Tr. 72).

(n) That the Engineer set up a specified extra for the different work on the baffle walls, the extent and cost of which **was known and agreed upon** (Tr. 72).

(o) That upon all other different or additional work required to be done except the extra expense of excavating the portion of the basin not underlaid with rock, the extent and nature thereof **being known** the parties agreed upon the additional cost, and six extras were set up and progress payments made (Tr. 72, 73).

(p) That the Engineer continuously urged the speeding up of the work of excavating that portion of the basin not underlaid with rock, and repeatedly confirmed the direction by letter (Tr. 73).

(q) That the Engineer was continuously present and knew and examined the cost sheets in excavating for doing the extra work (Tr. 73).

(r) That the Engineer knew that a large amount of work was being done and assured the plaintiffs that the same would be paid for, and that the Engineer knew that unless they were paid for extra expense the plaintiffs would go bankrupt (Tr. 73).

(s) That the work done in excavating the portion of the settling basin not underlaid with rock differed from the work of excavating to rock specified and required different equipment (Tr. 74).

(t) That when the work was substantially done and completed in February, 1943, the Engineer was presented with a statement of added expense (Tr. 74).

(u) The letters of February 17th, 1942, and March 13th, 1942 (Tr. 75, 76), referred to estimates of extra work.

(v) The letter of March 26th, 1942 (Tr. 77), clearly indicates that neither party knew the exact depth of the rock. Quoting the Engineer:

> "The total amount involved should not be any more than the total listed in your estimate, and as we understand it the rock pitches upward towards the south, so that the depth of excavation and the depth of concrete should be less than that given in your estimate, as well as the amount of reinforcing and the amount of forms."

It is convincing that the Engineer was surprised that "rock bed" was other than noted in the specifications and believed that rock would be found as specified; because of that the estimate by him for extras was at that time less than the estimate made by the plaintiffs. Because they accepted the engineer's assurances, the plaintiffs made their estimate upon the representations of the Engineer and upon the belief induced by the Engineer as to where the rock bottom was, which, of course, turned out to be otherwise.

We call attention to the letter of April 30th, 1942 (Tr. 78), by the Engineer.

> (1) "We suggest that you keep careful track of the extra cost due to rock excavation for this pipe line, so that we can check with you in time for the Menasha Water & Light Commission meeting which will be Monday afternoon at four o'clock" (Tr. 78).

And again in the letter of May 5th, 1942, the Engineer wrote:

> (2) "We talked with you over the 'phone and understood you to say that, although you figure this is a pretty small unit price, you would be willing to accept it rather than to attempt to do this work on a cost-plus basis provided in the contract" (Tr. 79).
>
> ". . . There still remains to be taken out of the basin area approximately three times as much as you took out last month . . . ."

And in the letter of May 16th, 1942:

(3) "Therefore, unless you find a much softer material than that we looked at this morning, it will be necessary to trench for the footings, which will make the top of the footings flush with the bottom of the rest of the basin" (Tr. 80).

And on June 2nd, 1942:

(4) "**Confirming verbal instructions** given you yesterday, we have been informed over the telephone that the Menasha Water & Light Commission passed a resolution instructing you to deposit excavated material from the pre-settling basin across the road in the triangular space owned by the Park Board, originally specified" (Tr. 81).

On August 11th, 1942, the Engineer wrote as follows:

(5) "In the line of conversation this afternoon, please be advised that the Water & Light Commission decided to riprap both the roadside of the settling basin and also the dredge bank side.

"**Here again they thought that your price was pretty high, but they feel that you have been having some tough breaks and they think that you are entitled to make a little profit on the riprap**" (Tr. 83). (Our emphasis.)

The estimate of October 3rd, 1942, was a joint estimate by the plaintiff and the engineers.

On October 5th, 1942, the Engineer wrote as follows:

(6) "(2) They would like to hold up Extra No. 6 involving approximately 4,000 yards of riprap at $1.50 a yard. They feel that it would be a mistake to place this riprap on new ground; that the grounds should be permitted to settle first, and they would like to wait and see how it looks and will decide whether or not they want to proceed with this Extra at a later date.

"(3) The Commission also noticed the thing that the writer spoke to Eddie about Saturday afternoon, namely, that the riprap on the west side of the dike does not go down deep enough. This should be extended down till the level shown on the plan, so that it will have a good foundation and not slide down at the first freeze and thaw" (Tr. 85).

On November 25th, 1942, the Engineer wrote as follows:

(7) **"In accordance with the request of the Commission you are hereby notified to prosecute this work and additions thereto so that it may be completed as promptly as possible"** (Tr. 86, 87).

(c)

City's and Petitioner's Reply Affidavit.
(Tr. 52 to 55.)

The substance:

1. That up to and including the Estimate No. 13, made on February 1st, 1943, the plaintiffs at no time made any claim for any extra, additional or different work of excavation (Tr. 54); and then recites and draws his conclusion:

"From said estimates it is **apparent** that no claim was made for excavation work which was not included in the contract."

2. That under the provisions of the contract any claims for extra work were required to be filed by the 5th day of the month succeeding the month in which such work was performed.

"Affiant further states that the letter of May 16, 1942, to plaintiffs from affiant, attached to affidavit of Fred Furton, filed herein, was written after it was discovered that under the places where certain baffle walls were to be erected, as shown on the plans and specifications, there was not a firm foundation, and

after a discussion of the matter it was determined that the footings under the baffle walls should be lowered, requiring the excavation of more material and more concrete, and the letter of May 16, 1942, directed plaintiffs only to trench for the baffle walls, and make no other changes from the plans and specifications" (Tr. 54, 55).

3. **"That as a matter of fact plaintiffs did not excavate the basin to any greater depth than the depth indicated on the plans and specifications, and as originally contemplated"** (Tr. 55).

A clear issue of fact as to how much was actually excavated.

(d)

The Plaintiffs' and Respondents' Reply Affidavit.

(Tr. 87 to 92.)

Substance:

(1) That Item No. 4 was a different work, excavating rock instead of earth (Tr. 88).

(2) That the Engineer verbally directed plaintiffs to proceed with the excavation of such rock and to keep a careful record of cost thereon so that the same could be ascertained or determined as provided in the contract. This verbal agreement was confirmed by letter on April 30th, 1942, and the Engineer examined the plaintiffs' record of cost of excavating of rock (Tr. 88).

(3) **That at all of said times it was not known to what extent rock existed in said pipe line trench as shown on the plans.** No one knew the number of yards of rock which would have to be excavated (Tr. 88).

(4) That on November 10th, 1942, the Engineer directed in writing that the stone wall is to be "in place of the 12 inches of riprap on both sides of dike originally shown on the plans" (Tr. 89).

(5) That the Engineer frequently assured affiant that they could expect fair treatment from the commission on account of the conditions encountered in the basin and the project of adding this riprap was made by said Engineer as shown by his letter for the purpose of providing plaintiffs with additional funds immediately and with same profit on their operations (Tr. 89).

(6) That the estimates approved by the Engineer for the extra work were signed by the plaintiffs to provide a claim and the plaintiffs were powerless to make any claim in said estimates not submitted by the Engineer (Tr. 90).

(7) "Affiant states that it never made any claim in writing to the Engineer or Defendants for any extra and additional work until February, 1943, and that all payments made prior to that time were made pursuant to the Engineer's estimates, and that no claim was made on account of the different cost of work in the excavating of the pre-settling basin because until that time it was not known what the extent of such different work would be and it was not known what the extra cost of said work would be. That affiant promptly upon completion of such different work prepared and filed claim for the extra cost of such different work" (Tr. 90).

"This claim was held before the fifth of the month succeeding completion of the work. That it was well known to said Engineer Orbison and to the commission that said work was different from the work specified in the contract, to-wit, 'excavating to rock' and that the difference in said work did occasion Plaintiffs added expense, and that such added expense varied considerably with weather conditions and other conditions" (Tr. 90, 91).

"That from the time when it was first discovered that the rock did not exist at the level specified on the plans it was well known to all parties that the pre-

settling basin would have to be excavated, rock or no rock, or the entire project abandoned or reorganized" (Tr. 91).

Instructions to Bidders (Tr. 17):

"(c) Bidders must satisfy themselves, by personal examination of **location of the proposed work** . . ."

Proposal (Tr. 95) calls for the following:

"Having carefully examined the Advertisement, Instructions to Bidders, **Contract Agreement**, General Conditions, Specifications, Bonds and **Plans** for the proposed work, and having informed ourselves fully in regard to the conditions to be met in its execution, the undersigned proposes . . ."

Affidavit by the Engineer (Tr. 96). He personally supervised and directed the work in preparing the plan for a pre-settling basin, and that the plan (Tr. 97) is the only plan prepared for the construction of the pre-settling basin . . . that the identical plan was submitted to all bidders, together with the specifications upon which bids were taken and contract awarded on December 17th, 1941.

(e)

The Map.

(Tr. 97.)

An inspection of the map reveals the following:

Just below the north center, above what is described as Baffle Walls, see "Rock El. 87.16±."

In the center, at the right end of Section of Dike A-A, see "Rock 87.2±."

At the southeast end, to the left of El. B-B, Headhouse, see "Crest of Menasha Dam 94.23."

At the extreme east below the center, above the Section, see "El. 87.2±."

III.

Decisions.

The Circuit Court of Appeals correctly cited, read and followed **Sartor v. Arkansas Nat. Gas Corp., 321 U. S. 620, 88 Law Ed. 967**; and we cite from the Law Edition the majority opinion by Justice Jackson, page 971:

> "The defendant undertook to establish the absence of a triable issue by the affidavits of eight persons. It may be assumed for the purposes of the case that the witnesses offered admissible opinion evidence which, if it may be given conclusive effect, would sustain the motion. It will serve no purpose to review it in detail, and we recite only the facts which made it inconclusive . . ."
>
> "Much of the controversy, as will be seen from the prior history of the case, is over the question whether these contract prices may be used in aid of the plaintiffs' case. Defendant uses these contracts only to explain their prices away by showing differences in market conditions. They do not establish the claim that there is a wellhead market price."

On page 972:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. American Ins. Co. v. Gentile Bros. Co. (CCA 5th), 109 F. (2d) 732; Whitaker v. Coleman (CCA 5th), 115 F. (2d) 305. In the litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

On page 973:

"We think the defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiffs' attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner. The judgment accordingly is reversed."

* * * * * * *

"Rule 56 (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

"The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. Campana Corporation v. Harrison, 7 Cir., 135 F. 2d 334, 336. Because we think this record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted."

Burley et al. v. Elgin, J. & E. Ry. Co., 140 F. (2d) 488 (7 C. C. A.).

Summary judgment reversed.

"On appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt."

Walling et al. v. Fairmont Creamery Co., 139 F. (2d) 318 (8 C. C. A.).

Summary judgment reversed.

"The plaintiff insists that his complaint set forth a cause of action, that the answers of the defendants raise triable issues of fact, and that the District Court was not justified in concluding that 'no bona fide issue exists between the parties:' Consequently, we must determine if there is a genuine issue as to any material fact. Fletcher v. Krise, 73 App. D. C. 266, 120 F. 2d 809, 811."

Fishman v. Teter et al., 133 F. (2d) 222 (7 C. C. A.).

The complaint was unverified.

"As to the first question. The purpose of Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, was to enable the court to enter summary judgment when the pleadings and affidavits that may have been filed with the pleadings, clearly showed that there was no issue of fact to be tried. The court in such proceedings is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings. In the case at bar the Corporation alleged in its complaint that it bore the burden of the tax and that its dealings with the Sales Company were at arm's length. The Commissioner in his answer denied these allegations. This presented sharp, clear issues of fact. Affidavits were filed to prove and to disprove these issues of fact, and the court on these conflicting affidavits undertook to resolve the conflict. This action of the court was not proper on the motion for summary judgment. The affidavits did not demonstrate that there

were no issues of fact; they demonstrated that there were decided issues of fact. The Commissioner could not be foreclosed on the right to a trial on those issues by the entry of summary judgment."

Campana Corporation v. Harrison, 135 F. (2d) 334 (7 C. C. A.).

Summary judgment reversed.

Section 270.635 of the Wisconsin Statutes (summary judgment);
Prime Manufacturing Co. v. Gallun & Sons Corporation, 229 Wis. 349, 281 N. W. 697;
Sullivan v. State, 213 Wis. 185, 251 N. W. 251.

The rule is the same.

We submit that there is a genuine controversy between the parties which cannot be summarily disposed of on affidavits. The plaintiffs and respondents are entitled to their day in court, for the reason that a controversy exists for a jury as to:

(a) The completeness of the work,

(b) The failures of payments and their causes,

(c) The added cost and the trouble traceable to the rock bottom representations,

(d) Lack of written order by the engineer for additional work and expense,

(e) The waiver by the parties of such written order,

(f) The nature and character of the rock bottom representations,

(g) Misrepresentations as to the bed rock,

(h) Failures to meet the terms and conditions of the contract and their excuses.

CONCLUSION.

There are no questions of law involved, no issue of general public importance, no conflict of decisions, and **Sartor v. Arkansas Nat. Gas, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967,** is followed.

There is, however, a controversy of fact and, therefore, a genuine issue for a court or jury.

Respectfully submitted,

WILLIAM B. RUBIN,
Of Counsel for Respondents.

November 1, 1945.

Address of Counsel:

606 West Wisconsin Avenue,
Milwaukee 3, Wisconsin.